LIBRARY
SUPREME COURT, U. S.
1574

Supreme Court, U.S.
FILED
APR 12 1971
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

WYMAN C. LOWE,

Appellant,

vs.

ANDREW YOUNG,

Appellee.

October Term, 1970

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF GEORGIA

JURISDICTIONAL STATEMENT

WYMAN C. LOWE
Appellant, Attorney pro Se
701 Carnegie Building
Atlanta, Georgia 30303

I N D E X

	page
1. Jurisdictional Statement	1
(a) Reference to official and unofficial reports of the opinions delivered in the courts below, if any, and if reported	1
(b) Statement of the grounds on which jurisdiction of this court is involved	1 a
(i) Nature of proceedings and statutes pursuant to which it is brought	1 a
(ii) Date of judgment sought to be reviewed, time of its entry, date of notice respecting denial of motion for rwhearing, date notice of appeal was filed and court where filed	1 a
(iii) The statutory provisions believed to confer on this Court jurisdiction of the appeal	1 b
(iv) Cases believed to sustain the jurisdiction	2
(c) The questions presented by the appeal	8 o
(d) Statement of the case	9
(e) Presentation of grounds upon which it is contended the federal questions are substantial	27
Paragraphs (h), (i) and (j)	30
Appendix	i

TABLE OF STATUTES AND CODE SECTIONS CITED

	Page
Statutes believed to confer jurisdiction on the Court	1 b
Sec. 34-1709 of Ga. Election Code	1 a
Sec. 1257 of Title 28 of U. S. C.	1 b and 8 h
Sec. 2101 of Title 28 of U. S. C.	1 b
Sec. 34-1709 of Ga. Election Code	5, 8 o
Chap.17 of Ga. Election Code	9
Sec. 81A-112 (b)(6) of Ga. Code	13, 17
Sec. 81A-156 of Ga. Code	13
Sec. 34-1512 of Ga. Election Code	23

TABLE OF CASES

	Page
American Railway Express Co. v. Levee	8 i
Coe v. Armour Fertilizer Works	8 m
Creswill v. Grand Lodge, K. P. of Ga.	8 c
Demorest v. City Bank Farmers Trust Co.	8 a
Downham v. Alexandria, Va.	8 k
Erie R. Co. v. Purdy	8 d
Gaston v. Keehn	8 b
Giles v. Harris	8 o
Gorman v. Washington Univ.	8 k
Great Northern Rwy. Co. v. Sunburst Oil and Refining Co.	8 m
Gregory v. McVeigh	8 l
Group Health Ins. of N. J. v. Howell	8 f
Hague v. Committee for Industrial Organization	8 l
Home Ins. Co. v. City Council of Augusta	8 l
Jamison v. State of Texas, Tex.	8 k
Jeannette First Nat. Bank v. Missouri Glass Co.	8 k

Table of Cases cont.	Page
Kanawha, etc., R. Co. v. Kerse	8 m
Kanouse v. Martin	8 k
Kentucky v. Powers	8 j
King, et al v. Lewis	2
Love v. Griffith	8 n
Lovell v. City of Griffin, Ga.	8 c
Memphis St. Ry. Co. v. Rapid Transit Co.	8 o
Michigan-Wisconsin Pipe Line v. Calvert	8 i
Mitchell v. Joplin Nat. Bank	8 j
Newport Light Co. v. Newport, Ky.	8 k
Polar Ice Cream & Creamery Co. v. Andrews	8 a
Powell, et al v. Smith	2
Scott v. Platt	8 d
Staub v. City of Baxley	8 c
Turnpike Co. v. Virginia	8 m
United States v. Richmond	8 j
Virginian Railway Co. v. Mullens	8 i

Table of Cases cont.

	Page
Western Union Telegraph Co. v. King	2
Western Union Tel. Co. v. Crovo	8 n
White v. State of Georgia	8 b
White v. Ragen	8 m
Whitfield v. State of Ohio	8 d

IN THE
SUPREME COURT
OF THE UNITED STATES

WYMAN C. LOWE,
Appellant,

vs.

ANDREW YOUNG,
Appellee.

October Term, 1970

JURISDICTIONAL STATEMENT

1. The following Jurisdictional Statement required by paragraph 2 of Rule 13 is submitted for the Appellant, WYMAN C. LOWE, in the above captioned appeal in compliance with the requirements in Rule 15 of this Court with respect to contents and order of contents:

(a) The opinion delivered in this case in the Court of Appeals of the State of Georgia on December 1, 1970 is officially reported in Advance Sheets for 123 Ga. App.121-122. This appeal is taken from the decision included in that report. Appeal had been taken by Wyman C. Lowe, plaintiff in the case in the Superior Court of Fulton County, Georgia, to the Court ot Appeals of Georgia from the final judgment entered in that Superior Court on October 15, 1970. There was no report of any opinion delivered in con-

nection with that judgment and that order. A copy of the official report of the opinion and decision of the Court of Appeals of Georgia, copy of the finding and final judgment of the Superior Court as entered on October 15, 1970, and copy of the order of the Superior Court as entered on October 9, 1970 are in the Ap-Appendix hereto.

(b) (i) The proceeding in the Superior Court of Fulton County, Georgia was a contestof the officially declared results of the Democratic Primary Runoff for nomination for United States Congressman for the Fifth Congressional District of Georgia between Andrew Young and Wyman C. Lowe,in which Andrew Young was the winner.The contest was brought pursuant to Chapter 17 of the Georgia Election Code, which is separately bound, and is also contained as Title 34 in Volume 12 of the Georgia Code. The appeal from the final judgment rendered on October 15, 1970 and entered on that date in the Superior Court to the Court of Appeals of Georgia was taken pursuant to Section 34-1709 "Appellate review" of the Georgia Election Code, which Code constituting Title 34 of the Georgia Code.

(ii) The date of the judgment of the Court of Appeals of Georgia sought to be reviewed and the time of its entry were both October 15, 1970. Letter notice to the undersigned attorney pro se from the Clerk of that Court of Appeals showing denial of the appellant's motion for rehearing was dated December 16, 1970. Notice of appeal to this Court was filed on January 29,1970 in the Court of Appeals of Georgia.

(iii) The statutory provisions believed to confer on this Court jurisdiction of this appeal are June 25, Ch. 646, 63 Stat. 929, as codified in Section 1257 of Title 28 of tne Code of the United States; and June 25, 1948, Ch.646, 62 Stat. 961, May 24, 1949, Ch. 139, Section 106, 63 Stat. 104, codified in part in Section 2101 (c) of the Code of the United States.

(iv) Cases believed to sustain the jurisdiction.

Court of Appeals of Georgia has jurisdiction to decide questions of law that involve application, in general sense, of unquestioned and unambiguous provisions of Constitution of State or of United States to given state of facts, and that do not involve construction of some constitutional provision directly in question and doubtful either under its own terms or under decisions of Supreme Court of State or of United States, and that do not involve constitutionality of any law of State or of United States or any treaty.

Western Union Telegraph Co. v. King, 188 Ga. 95, 96 (2 S E 2d 909;

Powell, et al v. Smith, 70 Ga. App. 754 (1) (29 S E 2d 521)

King, et al v. Lewis, 188 Ga. 594 (2 S E 2d 675)

As this appeal is taken from an order of a final nature of the Court of Appeals of Georgia, the foregoing decisions of Georgia appellate courts have been cited to show that the Court of Appeals of Georgia, not the Supreme Court, had right of jurisdiction with respect to one of the law questions indicated in paragraph (c) hereinafter, involving application of the "due process of law" clause in the Fourteenth Amendment of the United States Constitution to a certain state of facts that existed in the process of the appeal; and to show that said Court of Appeals is, in

effect, the highest court in Georgia for review with respect to such a question.

That state of facts consisted of the filing by the appellant of notice of appeal to the Court of Appeals of Georgia in Fulton County Superior Court within four days after the entering of the order of final nature from which the appeal taken; the causing by the appellant of the rushing by court reporter of typing and filing of lengthy transcript of evidence and proceedings of the October 15, 1970, hearing and of the transcript of proceedings of the October 9, 1970, hearing; the filing of the entire record on appeal, including said two transcripts, with the Clerk of said Court of Appeals and service by appellant on the date of docketing, October 27, 1970, of a motion for the appeal to be heard before November 3, 1970, date of the General Election; the failure of that Court of Appeals to grant the motion; the ruling by that Court of Appeals on December 1, 1970, after hearing of the appeal on November 23, 1970, that the issues in the appeal were moot because of the election of the Republican Thompson on November 3, 1970; the extreme difficulty or impossibility of obtaining appellate review of the order of final nature, entered on October 15, 1970, within the short period of 19 days remaining between then and November 3, 1970, date of the General Election, under said conditions in accordance and in compliance with Section 34-1709 in the Georgia Election Code, that section having title "Appellate review", and being the only section therein relating to appellate review.

The record shows that the complete record on appeal, including the transcript

of the proceedings on October 9, 1970, and the lengthy transcript of the hearing of the evidence in the proceedings on October 15, 1970, was filed and the appeal docketed in the Court of Appeals on October 27, 1970, seven days before the November 3, 1970, General Election; that on the day of the docketing of the appeal, appellant filed in that Court of Appeals a motion that the appeal be heard before the November 3, 1970, election; that the motion was not granted and the appeal was not heard until November 23, 1970. Reference is made to the photocopy of the opinion and decision of that Court of Appeals in that Lowe v. Young appeal which is page iii of the hereto attached Appendix. It is shown therein that the Court of Appeals held that the issues raised by the appeal had become moot because, in effect, of the election of the Republican Thompson in the November 3, 1970, General Election.

Appellant did not know until he received by mail on December 2, 1970, from the Clerk of that Court of Appeals, a copy of the opinion and decision of that Court rendered and entered on December 1, 1970, of the holding of the Court that the election of Thompson made the issues moot. At the first opportunity he had thereafter, which was in his motion for rehearing that he timely filed on December 11, 1970, he raised the "federal question" of denial, under said state of facts, of "due process" of law as guaranteed in a clear and unambiguous clause in the 14th Amendment.

That he did at his first opportunity so raise that "federal question", is shown by the following quotation from pages 11, 12, and 13 of his motion for rehearing,

which is in the record:

> "Section 34-1709, having the Title 'Appellate review', in the 1970 Georgia Election Code is quoted next:
>
> 'An appeal from the final determination of the court may be taken within ten days from the rendition thereof to the Supreme Court or Court of Appeals as in other civil cases. Such court shall consider applications for stays or supersedeas in such cases without regard to whether any bill of exceptions has been certified or the record docketed in such cases'.
>
> "The first sentence in said Section shows that an appeal from the final determination of a court, which would be a Superior Court, may be taken only 'as in other civil cases', except that the time for taking the appeal is delimited from 30 to 10 days. By the taking of an appeal in such a contested election case is evidently meant the filing of the notice of appeal in the proper Superior Court. No provision is made in that paragraph or anywhere in the Election Code for requiring the filing of a transcript made by a reporter of the evidence and proceedings in a hearing in such a case other than within the 30 days from date of filing of notice of appeal required in a section in Title 6 of the Georgia Code. The pressure of time involved in getting an appeal from a final determination by a Superior Court in a contested election

"case docketed, which involved the filing of a transcript of the evidence and proceedings of a hearing in the case with the Clerk of the Superior Court before the record on appeal, including such a transcript, could be filed or docketed in an Appellate Court, the appeal heard and decided between the date of a Democratic Primary Runoff held on September 23, 1970 before a General Election held on November 3, 1970 was very great, and the time limitations involved were very difficult to meet.

* * * * * * * * * * *

"Thus, the appeal was not heard until after the November 3, 1970 General Election was held. The Court of Appeals, in its Judgment rendered on December 1, 1970 held that the issues in the appeal were moot and dismissed the appeal. Before November 16, the Court, on motion of Appellee's counsel to extend the time for filing Appellee's Brief, granted an extension until November 23 for that purpose and set the date of hearing of the appeal for November 23, 1970.

"Appellant contends that he was unable to have 'due process of law' under said conditions * * * of the guarantee of 'due process of law' made in a section of Artiele 1 of the Constitution of Georgia and in the Fourteenth Amendment to the United States constitution * * *."

Appellant did cause delivery to be made timely to the office of the Clerk of the Supreme Court of Georgia of his application, with the required number of copies, for writ

of certiorari for review of said decision of the Court of Appeals of Georgia. The delivery was made for him by a security guard of the State Judicial Building in Atlanta, where office of said Clerk is located, on the night of Friday, January 15, 1971, before midnight, and signed notation made by the guard showing date and time of delivery left with the application and copies on a desk in that office. This was done in accordance with an offer made by that Clerk on said date, in a telephone conversation, to file on Monday, January 18, 1971, the application as of January 15, 1971. In that telephone call to the Clerk, the undersigned attorney pro se had stated his intention of mailing by certified mail at the main Post Office in Atlanta the application and copies before midnight of January 15, 1971, and have the large envelope containing them postmarked January 15, 1971, pursuant to a paragraph in a Rule of that Supreme Court that authorized the filing by the Clerk of such paper as of date of postmark provided mailing made by certified or registered mail. That Clerk then did in the conversation make said offer as to date of filing with respect to delivery by a security guard of the application and copies into her office.

On Monday, January 18, 1971, the undersigned received a telephone call from an assistant to that Clerk indicating the petition and copies would not be filed because a certain kind of required certificate of counsel as to the petition had not been delivered with it. A Rule of that Supreme Court at end of those Rules relating to an application for certiorari required in part that a certificate by counsel to effect he believed the petition set forth grounds for certiorari as contemplated

within Rules of that Court accompany the petition. The undersigned had overlooked that Rule. However, he did on night of Monday, January 18,1971, cause delivery by such guard of such required certificate and copies to be made to the office of that Clerk before midnight of that date and signed notation by the guard showing date and time of delivery into that office left with the certificate. Thus, the said certificate did almost "accompany" the timely submitted application.

On the next day, January 19, the Clerk wrote the undersigned a short letter indicating the Chief Justice had instructed her to return the petition, certificate, and copies to the undersigned. They were returned with that letter. At the undersigned's request, that Clerk wrote a letter on March 10, 1971, stating in more detail the circumstances relating to the delivery of the petition and certificate and refusal of the Clerk to file them. In the undersigned's said telephone request, he stated he wished to send such letter as an attachment to an application to this Court for extension of time for docketing his appeal to this Court, and requested she address the letter to him. She seems to have misunderstood that his request was for the letter to be addressed to him and addressed it instead to the Clerk of this Court. She handed the letter to him at her office, and he sent the original as an attachment with his application for such time extension to the Clerk of this Court, the application being addressed on its face to Justice Black of this Court.

Copies of said two letters written by the Clerk of the Supreme Court of Georgia are on the last pages of the Appendix at

the end of this Jurisdictional Statement.

The said attitude of the Chief Justice and Clerk of the Supreme Court of Georgia with respect to not allowing the filing of the application and certificate seem to have been the equivalent or almost the equivalent of refusal of that Court to take jurisdiction.

In support of the sustaining of the jurisdiction of this Court of this appeal, the following citations of decisions are made:

> Whether state court denied to rights asserted under local law protection guaranteed by U.S.C.A. Const. is question on which Supreme Court's judgment may be invoked. Demorest v. City Bank Farmers Trust Co., 64 S. Ct. 384, 321 U. S. 36, 88 L. Ed. 526.
>
> Principle of due process of law secures citizen against arbitrary deprivation of his rights, and is limitation upon arbitrary power and guaranty against arbitrary legislation. Polar Ice Cream & Creamery Co. v. Andrews, 208 F. Supp. 899, reversed on other grounds 84 S. Ct. 378, 375 U. S. 361, 11 L. Ed. 2d 389.

Where in writ of error to dismissal of petition for certiorari seeking review of judgment holding one in contempt of court, exception is taken to such judgment as violative of certain named provisions of Constitutions of Georgia and of United States, and such assignment of error does not contemplate construction of Constitution where meaning of some provision thereof is directly in question, or is doubtful by force of its own terms or under decisions of Supreme Court of United States or Supreme Court of Georgia, Court of Appeals of Georgia, and not Supreme Court of Georgia, has jurisdiction of writ of error. White v. State of Georgia, 196 Ga. 847 (27 S E 2d 695).

Jurisdiction of writ of error is in the Court of Appeals of Georgia, not in Supreme Court of Georgia, on exception to overruling of demurrer presenting contention that laws of Georgia, and not those of Illinois, govern in suit by receiver, appointed by Illinois Court, of mutual insurance company, to recover of resident of Georgia amount of assessment under policy held by defendant; and that to hold him bound by Illinois proceedings would deprive him of his property without due process of law, in violation of Federal and State Constitutions. Gaston v. Keehn, 195 Ga. 559 (24 S E 2d 675).

Whether rights under Federal Constitution asserted by appellant were given due recognition by Georgia Court of Appeals was a question as to which appellant was entitled to invoke judgment of United States Supreme Court, and it was within province of the Supreme Court to inquire, not only whether the right was denied in express terms, but whether it was denied in substance and effect, by putting forward non-federal grounds of decision that were without fair or substantial support. Staub v. City of Baxley, 78 S. Ct. 277, 355 U. S. 313, 2 L Ed. 302.

Whether question of violation of a defendant's constitutional rights was adequately presented and was decided in state court is itself a "federal question", as respects Supreme Court's jurisdiction. Lovell v. City of Griffin, Ga., 58 S. Ct. 666, 303 U. S. 444, 82 L. Ed. 949.

A question of law arising out of contention that there was no evidence to support finding of fact, as a result of which a federal right was denied, is open to review in the Federal Supreme Court on writ of error to a state court, if the evidence is in the record. Creswill v. Grand Lodge, K.P. of Ga., 32 S. Ct. 822, 225 U. S. 246, 56 L. Ed. 1074.

Constitutional questions passed on by state appellate court could be considered by United States

Supreme Court, even if they were not properly raised in trial court. Whitfield v. State of Ohio, 56 S. Ct. 532, 297 U. S. 431, 80 L. Ed. 778.

"If the highest court of the state by its final judgment sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could review that judgment although no federal question was distinctly raised or insisted upon in the trial court." Erie R. Co. v. Purdy, 22 S. Ct. 605, 185 U. S. 148, 46 L. Ed. 847.

Even when the federal question is first presented by a petition for rehearing in the state court, the United States Supreme Court will not take jurisdiction on certiorari unless that question was thereupon considered and passed on adversely by the state court or the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right. Scott v. Platt, 137 P. 2d 975, 171 Or. 379.

As is more fully shown in (d) Statement of the Case hereinafter, it was extremely difficult and almost impossible

to obtain appellate review, under Section 34-1709 "Appellate review" in the Georgia Election Code, of the order of final nature rendered and entered on October 15, 1970, within the 19 days remaining until the November 3, 1970, General Election. That section reads:

> "Appellate review.--An appeal from the final determination of the court may be taken within ten days from the rendition thereof to the Supreme Court or Court of Appeals as in other civil cases. Such court shall consider applications for stays or supersedeas in such cases without regard to whether any bill of exceptions has been certified or the record docketed in such cases."

The only changes in appellate procedure in election contest cases provided by that section in the Georgia Election Code from the appellate procedure provided in Title 6 of the Georgia Code in respect to other kinds of civil cases is that said Section 34-1709 delimits from 30 days to 10 days the time within which an appeal in an election contest case may be taken from a final determination and makes a change with respect to consideration of applications for stays or supersedeas. An applicable section in Title 6 of the Georgia Code governing appeals generally in civil cases requires that a party, usually an appellant, having responsibility for obtaining from a court reporter transcript of evidence and proceedings of a hearing and filing it must file such transcript within 30 days from date of filing notice of appeal. Only 15 days remained between date of filing of

the notice of appeal in the Superior Court in this case and November 3, 1970, date of General Election, the date before which appellate review was critically needed to be completed. No change as to the time limit of 30 days following date of notice of filing of appeal for filing such transcript is made anywhere in the Georgia Election Code. There could have been compliance with that applicable requirement in this case if the transcript of evidence and proceedings of the hearing following which the order of final nature was rendered had not been filed until November 16, 1970, which would have been 13 days after date of General Election. Said Section 34-1709 of the Georgia Election Code is in the same category as the kind of regulation referred to in the following decision and, therefore, is unconstitutional in that it violates the "due process of law" clause in the Fourteenth Amendment of the United States Constitution:

> A regulation which in practice is illusory or impossible to comply with is arbitrary and oppressive and would violate this clause. Group Health Ins. of N. J. v. Howell, 1964, 202 A. 2d 689, 43 N. J. 104.

Section 1257 of Title 28 of the Code of the United States contains certification of some of the statutes which confer upon this Court jurisdiction of this appeal.

Citations hereinafter are given to show additionally that this Court has jurisdiction to review on appeal the final judgment of the Court of Appeals of Georgia rendered and entered on December 1, 1970. Appellant, Wyman C. Lowe, caused delivery to be made

timely to the offices of the Clerk of the Supreme Court of Georgia on Friday, January 15, 1971, of original and required number of copies of his application for writ of certiorari for review by that Court of said final judgment of that Court of Appeals, but as shown hereinbefore in this Statement of the Case, the filing of that application was not allowed for a minor technical reason and jurisdiction of that Court was, in effect, thereby refused.

An important "federal question" was raised by the appellant in his motion for rehearing in that Court of Appeals at the first opportunity he had after receiving on December 2, 1970, copy of the opinion and decision of that Court of Appeals in which it was held that winning by the Republican Thompson in the November 3, 1970, General Election rendered the issues in the appeal moot. Appellant raised said "federal question" by alleging in his motion for rehearing in that Court of Appeals that he had been denied "due process" of law guaranteed in the 14th Amendment in application of that guarantee to the state of facts set out in that motion. That state of facts as alleged consisted in part of the filing of record on appeal and docketing of appeal seven days before date of said General Election after rushing completion of required reporter's transcripts, filing on date of docketing the appeal his motion that the appeal be heard before date of the General Election, but the appeal not being heard until 20 days after the General Election, and the issues in the appeal being declared moot in the decision rendered December 1, 1970.

Appellant raised in his motion for rehearing an issue or question involving

application of the said clear and unambiguous "due process" of law clause to a given state of facts. Decisions of the Supreme Court of Georgia cited on pages 2 and 8 b and a decision of this Court cited on page 8 c hereinbefore show that under said conditions, involving application of said "due process" of law clause, but not involving construction of part of the Constitution of Georgia or the United States, the Court of Appeals of Georgia, not the Supreme Court of Georgia, had right of jurisdiction.

Additional citations are given next of decisions, which, in effect, sustain the jurisdiction of this Court with respect to said "federal question" and another "federal question" with respect to whether said Section 34-1709, having title "Appellate review", of the Georgia Election Code is violative of the "due process" of law guarantee in the 14th Amendment, both of which "federal questions" having been raised by appellant at the first opportunity he had after receiving copy of the opinion and decision of said Court of Appeals holding that the issues in the appeal had become moot and finding, incorrectly, as hereinafter shown, "no distinction between this case and the holding in Lowe v. Lindsey":

> "28 U.S.C. Section 1257 begins:
>
> 'Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(1) Whether the method of review employed be that of appeal or writ of certiorari, it must first appear

"that the judgment is final and that it has emanated from the 'highest court * * * in which a decision could be had'. The language employed has been construed as warranting review by the Supreme Court of judgments of state courts which are situated relatively low in local judicial hierarchy. It has been held that the writ of certiorari is properly addressed to an intermediate appellate court, rather than the higher appellate court of the state, when review by the latter of the former's decisions is discretionary * * * American Railway Express Co. v. Levee, 1923, 263 U. S. 19, 41 S. Ct. 11 * * * In Virginian Railway Co. v. Mullens, 1926, 271 U. S. 220, 46 S. Ct. 526, 70 L. Ed. 915, a civil action in tort, the judgment of a trial court was reviewed by the Supreme Court of the United States on writ of certiorari, the state's Supreme Court of Appeals having previously declined to review the judgment of the trial court. Similar treatment of an appeal rather than review on certiorari was afforded by the Court as recently as 1954. Michigan-Wisconsin Pipe Line v. Calvert, 1954, 347 U. S. 157, 74 S. Ct. 396, 98 L. Ed. 583.

"(2) It appears then, that when a higher state court can, under the constitution and laws of this state, decline to review questions presented to lower courts and adjudicated therein, and has in fact declined, such lower court is, ipso facto, the 'highest court

" * * * in which a decision could be had."
United States v. Richmond, 177 F. Supp. 504, affirmed 279 F 2d 170.

An intermediate appellate court is, with respect to a case wherein its jurisdiction is exclusive, the highest court of the state. Mitchell v. Joplin Nat. Bank, 204 S. W. 1125, 200 Mo. App. 243.

The federal Supreme Court has jurisdiction, upon writ of error to re-examine the final judgment of a subordinate state court denying a federal right specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of federal right and "This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed." Kentucky v. Powers, 26 S. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

Where conviction in corporation court of city for distributing handbills on street in violation of city ordinance was affirmed by a Texas county court, and accused, who attacked ordinance on ground that it violated U.S.C.A. Const. Amend. 5, was fined $5, accused could appeal to no higher state

court and conviction was reviewable on appeal to the United States Supreme Court. Jamison v. State of Texas, Tex. 63 S. Ct. 669, 318 U. S. 413, 87 L. Ed. 869.

The last state tribunal to which cause could be brought for review constituted the "highest court of a state in which a decision could be had" within meaning of former section 344 of this title [now this section and sections 2103 and 2106 of this title], regardless of particular description or designation which may be applied to it by state statutes. Gorman v. Washington University, 62 S. Ct. 962, 316 U. S. 98, 86 L. Ed. 1300, rehearing denied 62 S. Ct. 1272, 316 U. S. 711, 86 L. Ed. 1777.

The "highest court", however, did not mean necessarily the highest appellate court in the state but the highest court "in which a decision in the suit could be had" and thus where the judgment of an inferior court was made final and without appeal in certain cases, such court is the highest court of the state in that class of cases * * * Kanouse v. Martin, 56 U. S. 198, 15 How. 198, 14 L. Ed. 660; Newport Light Co. v. Newport, Ky., 14 S. Ct. 429, 151 U. S. 527, 38 L. Ed. 259; Downham v. Alexandria, Va., 76 U. S. 659, 9 Wall. 659, 19 L. Ed. 807; Jeannette First Nat. Bank v. Missouri Glass Co., 147 S. W. 1030, 243 Mo. 409.

U. S. Ga. 1876 The Supreme Court of the United States may examine, and reverse or affirm, upon a writ of error, a final judgment or decree in any suit, in the highest court of law or equity of a state, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such validity. Home Ins. Co. v. City Council of Augusta, 93 U. S. 116, 23 L. Ed. 825.

Every question arising under the Federal Constitution may, if properly raised in a state court, come ultimately to the United States Supreme Court for decision. Hague v. Committee for Industrial Organization, 59 S. Ct. 954, 307 U. S. 496, 83 L. Ed. 1423.

"If a cause cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant that leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court". Gregory v. McVeigh, 23 Wall. 294, 23 L. Ed. 156.

"5. A federal claim first raised in a petition for rehearing in a state court is in time for purposes of review if the occasion for it arose unexpectedly from the grounds of the state court's decision." Great Northern Rwy. Co. v. Sunburst Oil and Refining Co., 281 U. S. 358.

If the highest court of a state refuses to allow a writ of error to the lower court and such refusal is also a refusal to take jurisdiction a writ of error from the Supreme Court should run to the lower court and not to the highest court of the state. Norfolk, etc., Turnpike Co. v. Virginia, 32 S. Ct. 828, 225 U. S. 264, 56 L. Ed. 1082. See, also, Kanawha, etc., R. Co. v. Kerse, 36 S. Ct. 174, 239 U. S. 576, 60 L. Ed. 448; Coe v. Armour Fertilizer Works, 35 S. Ct. 625, 237 U. S. 413, 59 L. Ed. 1027; Western Union Tel. Co. v. Crovo, 31 S. Ct. 399, 220 U. S. 364, 55 L. Ed. 498.

The denial of habeas corpus by one of lower courts of Illinois, not reviewable in any other state court, is a decision by the highest court of the state in which a decision could be had, and hence an original application to Illinois Supreme Court for the writ is not prerequisite to review in Supreme Court of the United States of decision of lower state court. White v. Ragen, 65 S. Ct.

978, 324 U. S. 760, 89 L. Ed. 1348, rehearing denied 66 S. Ct. 133, 326, U. S. 807, 90 L. Ed. 492.

The following citations of decisions are given in support of the sustaining of the jurisdiction of this Honorable Court with respect to the question of mootness of the issues in the appeal raised by appellant in his motion for hearing, filed December 11, 1970, in said Court of Appeals after that Court had in its final judgment entered on December 1, 1970, held the issues moot and dismissed the appeal:

> A party who plainly asserted a federal right in a state trial court and whose appeal from an adverse judgment was dismissed by a higher state tribunal upon the ground that the case, after judgment, had become moot, is entitled to the judgment of this court on whether such dismissal in effect denied, or failed duly to recognize, the right asserted and local rules as to the extent of review will not necessarily determine the decision here. Love v. Griffith, Tex.1924, 45 S. Ct. 12, 266 U. S.32, 69 L. Ed.157.
>
> "(6) There is one other question which under the peculiar circumstances of this case naturally presents itself, viz. whether the question involved here has become moot, but this is essentially a public question, one which involves the validity of a statute, and the question whether a constitutional right is being taken away is a question which is quite likely to

"arise at any primary election.

Under the principles recognized and adopted by the Supreme Court of the United States such questions do not become moot. See Giles v. Harris, 23 S. Ct. 641, 189 U. S. 484, 47 L. Ed. 909; also Memphis St. Ry. Co. v. Rapid Transit Co., 179 S. W. 635, 133 Tenn. 99, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 1045; * * *"

Dove v. Oglesby, 244 P. 797,800

(v) The validity of Section 34-1709, having title "Appellate review", in the Georgia Election Code is involved. The Georgia Election Code constitutes Title 34 of the Georgia Code, that Title 34 being in Volume 12 of the Georgia Code. That Section 34-1709 is on page 190 of the separately bound official edition of the Georgia Election Code, having cardboard covers. It reads:

"Section 34-1709. Appellate review.- An appeal from the final determination of the court may be taken within ten days from the rendition thereof to the Supreme Court or Court of Appeals as in other civil cases. Such court shall consider applications for stays or supersedeas in such cases without regard to whether any bill of exceptions has been certified or the record docketed in such cases. "

(c) The questions presented by the appeal.

1. Whether the Court of Appeals of Georgia, not the Supreme Court of Georgia, under decisions of the Supreme Court of Georgia in the (b) (iv) part of this statement, had right of jurisdiction with respect to the issue raised near the end of the motion for rehearing involving application of the "due process of law" clause of the 14th Amendment to relevant facts stated in the motion for rehearing, including the docketing of the appeal 7 days before the November 3, 1970 General Election, appellant's motion filed that day for the appeal to be heard before the General Election not being granted, and thereafter the issues in the appeal being held moot and the appeal dismissed.

2. Whether the appellant, at the first opportunity he had and in time to give this Court jurisdiction, raised the "federal questions" in his motion for rehearing, one of the "fedearl questions" so raised being whether he was denied, under the conditions alleged in the motion "due process of law" guaranteed in the 14th Amendment, and another "federal question" he raised in that motion being whether Section 34-1709 of the Georgia Election Code, entitled "Appellate review", as applied in and to the appeal, was violative of said "due process of law" guarantee in the 14th Amendment.

3. Whether the decision of that Court of Appeals, based at least partially on its finding of "no distinction between this case and the holding in Lowe v. Lindsey 223 Ga. 173 (154 SE 2d 11), should

be allowed to stand, considering that appellant, as attorney pro se, was not served until a few minutes before the hearing of the appeal with a copy of Appellee's Brief, wherein similarity of the two cases was contended, and that the motion for rehearing clearly shows great "distinction between this case and the holding in Lowe v. Lindsey"

4. Whether the decision of the Court of Appeals, based at least partially on its holding that "issues raised by this appeal are moot", should be allowed to stand, considering the record shows that appellant speedily and diligently took the steps required to obtain appellate review before the said Election, filed on the day the appeal was docketed 7 days before that Election a motion that it be heard before the Election, that the appeal was not heard until after the Election, and about a week after the hearing the Court of Appeals dismissed the appeal.

5. Whether the Court of Appeals erred in rendering its said decision on December 1, 1970, after appellant had clearly pointed out in his Enumeration of Errors filed in that Court and supported by his Brief errors committed by the Trial Court. Some of the errors appellant indicated in his Enumeration of Errors were the stating by the Trial Court, Judge H. O. Hubert, Jr., at the first hearing in the case that the results of the audit appellant was allowed to have made by an auditing firm of election records for the Runoff in two of the thirty-eight precincts where the electors were mainly black persons would be considered as a "guideline" and "test" with respect to the election records of

the additional 36 such precincts, but the final judgment rendered by the Trial Court at end of the second hearing in the case and the reporter's transcript of the evidence and proceedings of that hearing showing that the Court did not act in accordance with its said previous statements.

6. Whether the Court of Appeals erred in rendering the decision on December 1, 1970, considering that the copy of the motion of the defendant in the record to dismiss plaintiff's petition for failure to state a claim upon which relief can be granted and the transcript of the evidence and proceedings of the October 15, 1970 hearing together clearly show the motion to dismiss became during that hearing, under provisions of Section 81A-112 (b) (6) of the Georgia Code, a motion for summary judgment, that the evidence strongly indicated genuine issues of material facts which required trial by jury, but that the final judgment rendered at end of that hearing contained finding that there were not issues of fact requiring determination by a jury and dismissed the petition, as amended.

7. Whether the Court of Appeals erred in disregarding in effect No. 7 in Appellant's Enumeration of Errors and whether a "federal question" involving denial to appellant of "due process of law" guaranteed in the 14th Amendment was, in effect, raised in No. 7 of the Enumeration of Errors, wherein it was stated the Trial Court erred in failing to recognize and act upon plaintiff's request for a recount contained in an amendment to his petition, applicable decisions of Georgia appellate courts showing that, if request

for a recount is made by a party in an election contest case, the election can not be concluded until the recount is held.

(d) Statement of the Case

There were four candidates for nomination for United States Representative for the Fifth Congressional District of Georgia in the United States House of Representatives in the Democratic Primary held on September 9, 1970--two of the black race and two of the white race. None of the four received a majority of the votes cast. Andrew Young, of the black race, and Wyman C. Lowe, of the white race, were the candidates for nomination for that office in the Democratic Primary Runoff held subsequently on September 23, 1970.

The highest number of votes were received for Andrew Young in that Runoff. Reference will be made to the office hereinafter as "United States Congressman for the Fifth District of Georgia." Most of the residents of the City of Atlanta and County of Fulton, Georgia, reside within the Fifth Congressional District.

The Georgia Election Code, which constitutes Title 34 of the Georgia Code, applies to and governs the holding of primaries and elections in Georgia except for municipal offices. Chapter 17 of the Georgia Election Code, that Chapter having the title "Contested Primaries and Elections," applies to and governs primary and election contests, except with respect to municipal offices.

Wyman C. Lowe, as attorney pro se, filed timely with the Clerk of the Superior Court of Fulton County, Georgia, on September 29, 1970, his petition, naming Andrew Young defendant therein, and contesting, under said Chapter 17, the

officially declared results of the September 23, 1970, Democratic Primary Runoff. In accordance with provisions in Section 34-1704 (b) and (c) of the Georgia Election Code, the Clerk of the Fulton County Superior Court, Judge H. O. Hubert, Jr., of the Stone Mountain Judicial Circuit, a circuit adjoining the Atlanta Judicial Circuit, of the institution of the proceedings. Judge Hubert assumed jurisdiction of the case in the Fulton County Superior Court, but before he did the plaintiff requested him not to do so.

Two hearings were held in the case by Judge Hubert, one on October 9, 1970, and another on October 15, 1970. No evidence was adduced at the first hearing, but evidence was adduced at the last hearing, the longest in time of the two hearings. At the end of the first hearing, the Court rendered an order directing the striking from the plaintiff's pleadings of all allegations therein to "subversive activities" of the defendant.

Before the case was called for the first hearing, plaintiff filed timely a demand for jury trial in accordance with an applicable provision in said Chapter 17.

Among the grounds for contest plaintiff alleged, pursuant to Section 34-1703 of the Georgia Election Code, that section having title "Grounds for Contest," was the main ground that illegal votes had been received or counted for Andrew Young in the polling places of 38 precincts where the registered voters were predominantly black persons sufficient to change or place in doubt the result

for the Fifth District. There is only one polling place in each of the election precincts or districts in the Fifth Congressional District of Georgia.

The transcript of the proceedings of the hearing on October 9, 1970, shows that the plaintiff, as attorney pro se, requested the Court to allow him to have election records for two of the said precincts where registered voters were mainly of the black race audited before the next hearing as a guideline or test with respect to all the precincts where registered voters were predominantly persons of the black race. The Court then directed that the election records for two precincts, designated by the plaintiff, 3-A and 7-T, be made available in the Fulton County Courthouse on October 13 and 14, 1970, for inspection and obtaining of evidence for the parties by any of their auditors, accountants or representatives. That the Court indicated the results of such audit would be used as a guideline or test with respect to election records of all precincts where voters mainly of black race is shown by the following parts of colloquy between the Court, Mr. Bondurant, who was an attorney for the defendant, and Mr. Lowe, which is quoted from pages 23 and 24 of the transcript, that is in the record:

> "BY THE COURT: We will use that as a guideline. If it should appear that illegal votes were cast in such quantity, the Court would assume that they might have been cast in other precincts and the Court preserves the right if that appears, to direct other boxes to be counted, but that will essentially be the issue.

"BY MR. BONDURANT: In effect that will be a test case based on those two precincts and if the count isn't such - - -

"BY THE COURT: As to reflect validity of the election the Court will reserve the right to issue further orders even though it might take a little more time * * * Is that in accordance with what you wish?

"BY MR. LOWE: Yes, sir. You didn't delimit it and I didn't mean that either. * * *

"BY THE COURT: We have selected these two as a test * * *"

It is shown in the testimony of the plaintiff adduced at the October 15, 1970, hearing, the plaintiff employed at his expense Webb and Dreher, a reputable Atlanta firm of auditors and accountants, to audit the election records for said Precincts 3-A and 7-T for the September 23, 1970, said Runoff on October 13 and 14, 1970, in compliance with the said permission and direction of the Court. A chief accountant of that firm, Henry C. Armstrong, testified at the October 15, 1970, hearing, as shown in the transcript in the record, that he and a Mr. McPhail, an accountant of that firm, worked two days in making the said audit at the Fulton County Courthouse, under part-time supervision of Edward Dreher, a Certified Public Accountant of that firm. The chief accountant, as shown in the transcript, testified he and the other accountant devoted most of the two days by statistical spotcheck method to comparison of handwriting of signed names on voter certificates, further examination of the

voter certificates of said Precincts 3-A and 7-T, and by such spotcheck method to comparison of handwriting of signed names on voter certificates with the handwriting of the same signed names on corresponding voter registration cards for those precincts, that being done in the offices of the County Chief Registrar in the Fulton County Courthouse. Reference will be made hereinafter to testimony he gave with respect to the findings in the audit.

The hearing on October 15, 1970, was on the motion of the defendant made under the provisions of that part of the Civil Practice Act of Georgia codified in Section 112 (b) (6) of Title 81A of the Georgia Code on alleged ground of "failure to state a claim upon which relief can be granted." The last sentence in said Section 112 (b) of Title 81A of the Georgia Code, which sentence applying to that motion, reads:

> "If, on a motion asserting the defense numbered (6) for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Section 81A-156, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Section 81A-156."

Section 81A-156 (c) of the Georgia Code, that Section having title "Summary judgment", reads in part:

"The judgment sought shall be

"rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law; but nothing in this section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined."

The record shows there were no answers to interrogatories, admissions, or affidavits on file when the Order of final nature was rendered upon the conclusion of the hearing on October 15, 1970. The deposition of the plaintiff, taken by counsel for the defendant, the only deposition on file, was not filed until the beginning of the hearing on October 15, 1970. No part of it was read in open Court, and the Trial Judge did not read it before rendering said Order.

The transcript shows each of twenty witnesses, all called by the plaintiff, as attorney pro se, testified at the October 15, 1970, hearing. No witness, except one that had been called by the plaintiff, was called by the defendant. Fifty-one voter certificates and voter registration cards obtained in said audit were offered for the plaintiff and admitted in evidence. Two additional documents were offered for the plaintiff and stipulated as evidence by counsel for the parties. Two documents offered for the plaintiff were rejected. No documentary evidence was offered for the defendant. All of said documents are

bound in a volume of the transcript of the evidence and proceedings of the October 15 hearing.

Vote recorders, known as Votomatics, were used in each of the polling places in said Fifth District in the Democratic Primary Runoff on September 23, 1970. The first step in the procedure of voting was the obtaining by a voter of a voter certificate printed form and the filling in of the form, including signing by a voter. The next steps were the presentation of the completed voter certificate by a voter to a poll officer or clerk for checking against the list of qualified registered voters for the precinct to determine whether the name of voter signed on the certificate was on such list of voters, known as Electors' List, and, if the name on such list, the handing by a poll officer or clerk of a ballot card to the voter for use by him or her in a Votomatic. The printed form of one of the 51 completed voter certificates offered for the plaintiff and admitted in evidence at the October 15, 1970, hearing which are among the exhibits in one volume of the reporter's transcript is copied on the following page:

VOTER'S CERTIFICATE--RUN-OFF GENERAL PRIMARY

_____COUNTY, STATE OF GEORGIA

I hereby certify that I am qualified to vote at the

/7 Democratic
/7 Republican (Choose one) RUN-OFF GENERAL PRIMARY held on_____, 19__ and that I have not and will not vote elsewhere in this RUN-OFF GENERAL PRIMARY.

Signature_____Address_____
R.F.D., Street, Road and City

Name or initials of Poll Officer receiving voter's certificare:___

Ballot No._____
(Or number of admission to voting machine.)

==========

In case of physical disability, or illiteracy, fill out the following: I hereby certify that the voter is unable to sign his or her name by reason of the following:_____

Form No. 7--B--70

_____
Signature of Poll Officer

Section 34-1312 of the Georgia Election Code, which section having title "Assistance in voting", governs the rendering of assistance at a polling place to a voter who is illiterate or physically disabled. That Section 34-1312 is quoted next:

> "Section 34-1312. Assistance in voting.--(a) No elector shall receive any assistance in voting at any primary or election: Unless he is unable to read the English language; or there is recorded upon the electors list a reference to his declaration that he has a physical disability which renders him unable to see or mark the ballot or operate the voting machine or vote recorder, or to enter the voting compartment or booth without assistance, the exact nature of such disability being recorded on the electors list, and unless the poll officers are satisfied that he still suffers from the same disability; or unless he acquired such a physical disability after the time of registration and the poll officers are satisfied that he still suffers therefrom. Before an elector shall be permitted to receive assistance, he shall take an oath which shall be administered to him and placed in writing by a manager, giving the reason why he requires assistance. The name of each person assisting the elector shall be endorsed on the oath.
>
> (b) Any elector who is entitled to receive assistance in voting

"under the provisions of this Section shall be permitted by the managers to select (i) any elector, except a poll officer, who is a resident of the election district in which the elector requiring assistance is attempting to vote; or (ii) the mother, father, sister, brother, spouse or child of the elector entitled to receive assistance, to enter the voting compartment or booth with him to assist him in voting, such assistance to be rendered inside the voting compartment or booth. No person shall assist more than ten (10) such electors in any primary or election.

(c) The oaths of assisted electors shall be returned by the chief manager to the superintendent who shall cause the same to be duplicated and deliver the original oaths to the Ordinary of the county and the duplicates to the board of registrars. * * * * The oaths of assisted electors shall be available in the Ordinary's office for public inspection."

Reference to the copy on a preceding page 16 hereof of the kind of voter certificate used in said Runoff shows that the following appears in the lower one-third of the certificate:

"In case of physical disability, or illiteracy, fill out the following:

I hereby certify that the voter is unable to sign his or her name by

"reason of the following:___

_____

_____
Signature of Poll Officer"

There is in the Appendix hereto, near the end of that Appendix, a folded sheet containing photographic copy of three completed voter certificates which are among the plaintiff's Exhibits admitted in evidence at said October 15, 1970, hearing and contained in Vol. III of the Reporter's Transcript of evidence and proceedings of that hearing, that is in the record. Next beneath that folded sheet in the Appendix hereto is another folded sheet containing photographic copy of two voter registration cards which are also among the plaintiff's Exhibits admitted in evidence at said last hearing in the case in the Trial Court contained in Vol. III of said Reporter's Transcript in the record. It is requested that reference be made to said two Exhibits near end of the Appendix.

The name "Kathryn D. Mitchell" is signed to one of said three voter certificates and is also signed to each of said two voter registration cards. An inspection of handwriting of that signed name on each of the two registration cards and on the voter certificate shows the handwriting of it on each of the two registration cards appears to be by same person but that the handwriting of it on the voter certificate is not like the handwriting of it on the two registration cards. The address of that person shown on one of the two registration cards is in the Fifth Congressional District, but her address shown on the other registration card is in the Fourth Congressional District, that adjoins the Fifth. It does not appear that the person who signed as "Kathryn D. Mitchell" on the

voter certificate is the same person who signed the two registration cards.

It is indicated in a space provided on each of said two voter certificates that "Kathryn D. Mitchell" required no assistance in voting. However, the initials of a poll officer near bottom of the voter certificate for "Kathryn D. Mitchell" are to the effect such person was unable to sign her name, but no reason therefor was given by the poll officer in the space provided on the certificate. Likewise, the initials of another poll officer at end of each of the other two said certificates, one for "Joseph R. Burston" and the other for "Bessie B. Burston", shows the voter was unable to sign his or her name, but no reason therefor was given by the poll officer in the space provided near bottom of the certificate.

All of the handwriting on the three said voter certificates seems to be that of the same person. The handwriting of the first letter "E" in the word "Evelyn" that is a word in the street address of each of said three persons is strikingly similar.

None of the several requirements set forth in the hereinbefore quoted Section 34-1312 "Assistance in voting" was complied with with respect to the voter certificate for each of said three persons. Among the requirements specified in that Section not fulfilled with respect to any one of the three certificates were: written oath administered to the voter by the poll manager giving reasons why he or she required assistance; name of each person assisting the voter.

Paragraph (b) of said quoted Section

34-1312 indicates the persons, anyone of which, an illiterate or physically disabled voter may be permitted by poll managers to select to assist him or her inside a voting compartment in voting, selection of a poll officer being forbidden. That paragraph shows in effect also any such person present at a polling place may assist inside a voting compartment as many as ten purportedly illiterate or physically disabled electors.

The photographic copies of the three voter certificates and two registration cards are included in the Appendix hereto as illustrative of a condition the Chief Accountant of said firm, Webb and Dreher, auditors and accountants, testified he and another accountant of that firm found in their two-day spotcheck audit of election records for that Runoff of two of the said 38 precincts where the registered voters are mainly black persons.

Part of the testimony of that Chief Accountant, Henry Armstrong, adduced regarding said audit at the said October 15, 1970, hearing is quoted next from pages 37 and 38 of Vol. I of the Reporter's Transcript of the October 15, 1970, hearing, in the record filed in said Court of Appeals:

"MR. LOWE: In that connection, I call the attention of the court to the fact that there was a figure we stipulated a while ago, as to these precincts, that the total vote was nineteen hundred and something for - -

THE COURT: 1,985 in 7-T, and 1,147 in 3-A * * * * *

Q. In your so-called statistical spotcheck, the - - let us take up

"7-T first, the biggest one; what percentage - - what kind of spot-check did you do?

A. I selected at random 450 voters' certificates.

Q. And how many of those did you spotcheck against?
* * * * * * * * * * * * * *

A. Out of the 450 certificates that I selected for sampling, I found 42 signatures which appeared to me to be doubtful, 107 voters certificates initialed by the poll officer under the portion of the certificate setting forth 'In case of physical disability or illiterate, fill out the following: 'I hereby certify that the voter is unable to sign his or her name by reason of the following' --- no reason was filled in, but it was initialed there by the poll officer; 10 votes, statistical, were not initialed at all by the poll officer. * * * * * *"

THE COMPLETE LACK OF COMPLIANCE WITH THE APPLICABLE GEORGIA ELECTION CODE SECTION 34-1312 BY THE POLL OFFICER WHOSE INITIALS APPEAR AT BOTTOM OF THE VOTER CERTIFICATE FOR THE PURPORTED KATHRYN D. MITCHELL AND ANOTHER POLL OFFICER WHOSE INITIALS APPEAR AT BOTTOM OF THE VOTER CERTIFICATE FOR EACH OF SAID TWO OTHER PURPORTED VOTERS SIGNIFICANTLY POINTS UP THE PREVAILING OF THE SAME CONDITION WITH RESPECT TO 107 OUT OF 450 VOTER CERTIFICATES SELECTED AT RANDOM BY SAID CHIEF ACCOUNTANT. ACCORDING TO THE HEREINBEFORE QUOTED TESTIMONY OF THAT CHIEF ACCOUNTANT. HE FURTHER TESTIFIED, AS QUOTED, THAT AN

ADDITIONAL 10 OF SAID 450 CERTIFICATES DID NOT HAVE IN ANY ONE OF THE TWO PLACES THEREON FOR INITIALS OF A POLL OFFICER ANY INITIAL OF A POLL OFFICER. THUS, THERE WAS PROVEN TO BE GRAVE IRREGULARITY ON 117 OF 450 CERTIFICATES IN SUCH RESPECT-MORE THAN ONE OUT OF FOUR.

The 450 certificates selected by the Chief Accountant at random were less than 15% of the voter certificates in said two precincts used by voters in said Runoff.

As shown in his quoted testimony, he also testified that:

> "Out of the 450 certificates that I selected for sampling, I found 42 signatures which appeared to me to be doubtful * * *."

Addition of those 42 certificates, on each of which by comparison of handwriting of signature thereon with handwriting of signature on other voter certificates he found the signature doubtful, to the said 117 other voter certificates, with respect to each of which his testimony, in effect, showed non-compliance with Section 34-1312 "Assistance in voting", gives a total of 159 certificates out of 450, more than one-third of the 450 certificates selected at random by him.

THUS, HIS TESTIMONY SHOWED IN EFFECT THE VALIDITY OF MORE THAN ONE-THIRD OF THE VOTER CERTIFICATES EXAMINED, AFTER SELECTION OF THEM AT RANDOM, WAS AT LEAST VERY QUESTIONABLE.

A photographic copy of an absentee ballot for the said Runoff identified at the October 15, 1970, hearing in the testi-

mony of a Mr. Tillison, white man, as received by him, is in the Appendix hereto near the end thereof. It shows a listing thereon of the names of the two candidates for each of three other offices, Governor, State Comptroller-General, and Commissioner of Fulton County, for said Democratic Primary Runoff, but a blank space near center of the ballot conspicuously indicates absence of the names of the two candidates for nomination for Congressman for the Fifth District in said position in which it was printed on some other absentee ballots. That absentee ballot indicated the probability of omission of the names of the two Democratic candidates for nomination for Congressman for the Fifth District from absentee ballots sent to other white voters of the Fifth District.

Reference is made to the colloquy between the Trial Court and counsel for the parties that occurred at the first hearing on October 9 which is quoted on pages 11 and 12 hereof from the Reporter's Transcript, that is in the record.

The statements by the Court in the hereinbefore quoted colloquy at the October 9th hearing show the Court stated, in effect, that evidence obtained from the said audit of the election records of only Precincts 3-A and 7-T adduced at the October 15 hearing would be used as a guideline and test with respect to election records for the September 23, 1970, said Runoff of all precincts where the registered voters were mainly black persons. However, the phrasing of that Order, which the Court signed after it had been prepared by counsel for the defendant following the hearing on October 15, 1970, appears to indicate the Court had not treated the motion as one for

summary judgment, had weighed the evidence adduced from the audit only with respect to its effect directly upon the outcome of that Runoff, and had not used such evidence as only a guideline and test to be applied to all the precincts where voters were mainly black persons. A copy of that Order is on pages VII and VIII of the Appendix hereto.

IN OTHER WORDS, IT IS RESPECTFULLY STATED THAT IT DEFINITELY AND CLEARLY APPEARS FROM THE PHRASING OF THE ORDER PREPARED BY COUNSEL FOR THE DEFENDANT THAT JUDGE HUBERT SIGNED LATE IN THE AFTERNOON OF OCTOBER 15, 1970, FOLLOWING SAID HEARING ON THAT DAY THAT, CONTRARY TO HIS HEREINBEFORE QUOTED STATEMENTS HE MADE AT THE FIRST HEARING ON OCTOBER 9TH TO THE EFFECT THAT EVIDENCE OBTAINED FROM THE AUDIT OF ELECTION RECORDS FOR SAID TWO PRECINCTS WOULD BE USED AS A GUIDELINE AND TEST WITH RESPECT TO ELECTION RECORDS FOR ALL THE SAID 38 PRECINCTS, HE DID NOT SO USE SUCH EVIDENCE. IT FURTHER APPEARS FROM THE PHRASING OF THE ORDER, IN WHICH HE GRANTED THE MOTION TO DISMISS AND DISMISSED THE PETITION, AS AMENDED, HE DID NOT TREAT THE MOTION AS ONE FOR SUMMARY JUDGMENT, BUT IT WAS MANDATORY UNDER SAID SECTION 81A-112 (b) (6) OF THE GEORGIA CODE THAT IT BE SO TREATED.

The holding, finding, and judgment of the Court of Appeals of Georgia of dismissal of the appeal in this case, rendered on December 1, 1970, clearly show that the appeal was not decided on the merits. A photocopy of the opinion and decision of that Court of Appeals in the appeal Wyman C. Lowe, Appellant vs. Andrew Young, Appellee, as published in Advance Sheets 123 Ga. App. 121, 122, is attached hereto as an exhibit and made part hereof.

The said attached hereto photocopy shows that the Court of Appeals held "The issues raised by this appeal are moot", found "no distinction between this case and the holding in Lowe v. Lindsey, 223 Ga. 173 (154 SE2d 246)," and dismissed the appeal. A photocopy of the report as to the appeal Lowe v. Lindsey as contained in 223 Ga. 173, 174 is attached hereto as an exhibit and made part hereof. The hereto attached photocopy of that report shows "Lowe" named in the title of that report is Wyman C. Lowe and "Lindsey" named in the title is Archie Lindsey.

Reference is made to that part of the paragraph next preceding the last word "Held" therein in the opinion delivered on the appeal Lowe v. Young by Presiding Judge Jordan, as shown in the photocopy of the decision attached hereto. The "38 precincts" stated in that paragraph were alleged in the pleadings of Wyman C. Lowe in that case in the Fulton Superior Court to be precincts in which the registered voters on September 23, 1970, date of the Democratic Primary Runoff, were mainly black persons. The last sentence in that first paragraph of the opinion reads:

"Pursuant to appellant's motion

"for an early hearing, the appeal was set down for argument on November 23, 1970".

The Court erred in merely stating the phrase "Pursuant to appellant's motion for an early hearing" without indicating in some manner instead that the appellant in that motion moved specifically for "setting a date prior to November 1, 1970, for the hearing of the appeal," considering the urgency and need of having such hearing prior to the November 3, 1970, General Election.

The holding, finding and judgment of the Court of Appeals in the Lowe v. Young appeal are quoted next:

"Held:

"The issues raised by this appeal are moot. The court will take judicial notice of the fact that in the general election held on November 9, 1970, the Republican candidate Fletcher Thompson won over the Democratic candidate Andrew Young (the appellee here) and that the results of said election have been certified by the officials responsible for conducting the election.

"Under these circumstances, this court finds no distinction between this case and the holding in Lowe v. Lindsey, 223 Ga. 173 (154 SE2nd 246). Accordingly, the appeal must be and is Dismissed."

It is respectfully stated that the Court of Appeals of Georgia made a serious mistake in making the finding it did in the foregoing quoted last paragraph of its

decision in this case and then on basis of its finding dismissing the appeal, in that there were actually then several important distinctions between the Lowe v. Young case and the holding in Lowe v. Lindsey, 223 Ga. 173, which will be specifically pointed out hereinafter. It appears that Court of Appeals overlooked the major distinctions and that such overlooking by it greatly affected its decision.

With respect to the paragraph that begins with the words "The issues" and last sentence dismissing the appeal in the quotation hereinbefore of the decision of the Court of Appeals, it is stated that the Court of Appeals erred in holding that the issues raised by this appeal are moot, on basis of the facts that in the November, 1970, General Election the Republican candidate Fletcher Thompson won over the Democratic candidate Andrew Young and the results of that election have been certified by the officials responsible for conducting the election and then dismissing the appeal without rendering decision on the appeal on its merits, the matter and issues so affecting the public interest and being of such great importance to the citizens of the Fifth Congressional District as to require determination on the merits.

Appellant, as attorney pro se, was not served with a copy of Appellee's Brief until a copy was handed to him by one of the appellee's attorneys a few minutes before the hour set for the appeal to be argued on November 23, 1970. The lead or topical sentence in the first part of Argument and Citation of Authorities in that Brief for the appellee reads:

"A. The issues raised by the appeal are moot."

In the first sentence in the first paragraph in that part of the brief, appellee's counsel stated that in Lowe v. Lindsey, 223 Ga. 173 (1967)* * * * the Supreme Court of Georgia was confronted with an appeal presenting facts almost identical to those now before the Court". The Court of Appeals rendered its decision and judgment in the Lowe v. Young appeal about one week after the hearing and before appellant, as attorney pro se, filed a reply brief he had been preparing, among other things, replying to and rebutting the contentions of appellee's counsel in their brief, in effect, that the issues raised by the appeal were moot because the issues in Lowe v. Lindsey appeal had been declared moot on February 23, 1967, and that appeal presented "facts almost identical to those now before this Court". Actually, the facts presented by the Lowe v. Lindsey et al appeal were, instead of being almost identical with those in the Lowe v. Young appeal, almost entirely dissimilar and different, and there was great distinction between the Lowe v. Young case and said holding by the Supreme Court of Georgia. It is evident that the Court of Appeals, before appellant, attorney pro se, filed any brief in reply to said argument in the first part of Argument and Citation of Authorities, Part II, of appellee's brief accepted said argument of appellee's counsel in their brief that the facts presented to the Supreme Court of Georgia in the Lowe v. Lindsey appeal were almost identical with the facts presented to the Court of Appeals in Lowe v. Young appeal.

It will next, in consecutive paragraphs following this one, be respectfully shown wherein there were distinctions between the Lowe v. Young case and the holding in Lowe v. Lindsey, 223 Ga. 173, 174, notwithstanding that the Court of Appeals found "no distinction between this case and the holding in Lowe v. Lindsey 223 Ga. 173". About the only similarity between the Lowe v. Young case and the said holding in Lowe v. Lindsey was that at time the decision in Lowe v. Lindsey was rendered, February 23, 1967, by the Supreme Court, Fletcher Thompson had won in the November 8, 1966, General Election over Archie Lindsey and at the time the decision in Lowe v. Young was rendered on December 1, 1970, by the Court of Appeals, Fletcher Thompson had won in the November 3, 1970, General Election over Andrew Young.

As indicated in Headnote 1 of the holding in Lowe v. Lindsey et al, 223 Ga. 173, a commission had been "issued by the Governor to Fletcher Thompson on December 12, 1966, as the elected U. S. Congressman from the Fifth Congressional District of Georgia". In contrast, no commission as the elected U. S. Congressman from that District for the 92nd Congress had been issued by the Governor of Georgia to Fletcher Thompson on or before December 1, 1970, date the said decision of the Court of Appeals was rendered; and such commission was not issued to him by the Governor until about December 14, 1970, or thereafter. Headnotes 2 and 3 of the holding by the Supreme Court of Georgia in Lowe v. Lindsey et al are quoted next:

"2. The courts of this State are

"bound to take judicial notice of the public officers who hold under commissions issued by the Governor. Hartford Accident & Co. v. Mapp, 96 Ga. App. 517 (100 SE2d 742), and citations.

"3. The Governor is required by law to issue commissions to Representatives in Congress. Code Sec. 40-203".

Since such commission was not issued to Thompson by the Governor following the November 3, 1970, General Election before the Court of Appeals rendered its decision in Lowe v. Young appeal on December 1, 1970, the foregoing quoted Headnote 2 had no application to the Lowe v. Young appeal. Furthermore, a drastic change with respect to legal effect of issuance by the Governor of a commission to any person elected to any office was made when the following new Section 34-1512 became effective for the first time in the Ga. Election Code, as Amended Through Regular Session 1970:

"Section 34-1512 - Commissions if election contested. A commission which is to be issued as provided by this Code to any person elected to any office shall be issued notwithstanding the fact that the election of such persons to any such offices may be contested in the manner provided by this Code. Whenever it shall appear by the final judgment of the proper tribunal having jurisdiction of a contested election, that the person to whom such commission shall have been issued has not been legally elected to

> "the office for which he has been commissioned, then a commission shall be issued to the person who shall appear to be legally elected to such office, and the issuing of such commission shall nullify the commission already issued, and all power and authority under such commission first issued shall thereupon cease."

It is obvious that, on the basis of said new Section 34-1512 of the Ga. Election Code, the effect of the issuance by the Governor in December, 1970, of such commission for said office in the 92nd Congress, insofar as the Lowe v. Young appeal and this petition for writ of certiorari are concerned, is different from the effect of the issuance in December, 1966, by the Governor of such commission for said office in the 90th Congress, insofar as the Lowe v. Lindsey appeal was concerned.

Headnote 4 in the holding in Lowe v. Lindsey, 223 Ga. 173, 174, is quoted next:

> "4. There being no relief sought against the person elected to Congress in the general election, or against the election officials required to hold and certify such election results, the questions presented by the petition as finally amended are moot. Accordingly, the appeal must be dismissed."

With regard to the parts of the foregoing quoted Headnote 4 in the holding in Lowe v. Lindsey reading "There being no relief sought * * * * or against the election officials required to hold and

certify such election results", it is respectfully stated there was in the Ga. Election Code, As Amended Through the Regular Session 1966, and is in the Ga. Election Code, As Amended Through the Regular Session 1970, no requirement that any election official be named a defendant or joined as a party in a primary election or election contest. The only requirement in either of those two Ga. Election Codes as to the naming of any defendant in such a contest is shown in paragraph (b) of Section 34-1701, that Section being identical in both those Ga. Election Codes. Paragraph (b) of Section 34-1701 in each of those two Ga. Election Codes reads:

> "(b) the word 'defendant' shall mean: (i) the person whose nomination or election is contested; (ii) the person or persons whose eligibility to seek any nomination or office in a runoff primary or election is contested; or (iii) the public officer who formally declared the number of votes for or against any question submitted to the electors at an election, as the case may be".

Part of the one paragraph opinion in Lowe v. Lindsey, et al, 223 Ga. 173, reads:

> "* * * The petition as finally amended named only the substitute nominee and the State Democratic Executive Committee including its primary subcommittee as defendants. No county or state officials were named in plaintiff's petition as finally amended* * *".

The first two sentences in Headnote 1 of the holding in Lowe v. Lindsey reads:

> "1. The petition as finally amended sought relief against party officials of the Democratic party only. No relief was sought against any county or State official required to hold the general election, certify the results or issue a commission * * * *".

In this connection, the colloquy that took place between the Court and Wyman C. Lowe, as attorney pro se, at the first hearing, October 9, 1970, in this case in the Fulton Superior Court is quoted next from page 30 of the transcript of the proceedings:

> "BY THE COURT: Where is the section that says who shall be parties?
>
> * * * * * * * * * * *
>
> It says here that you shall serve the person whose nomination has been contested. He has been served. You could complicate and multiply the difficulties involved in this suit. I am going to rule he doesn't have to serve anybody else."

(e) Presentation of the grounds upon which it is contended that the federal questions are substantial.

It has already been shown in part (b)(4), consisting of pages 2 through 8-o, of this Jurisdictional Statement, through numerous appellate court decisions cited therein and statements made therein by the undersigned attorney pro se with respect to some of those decisions and violation of the "due process of law"guarantee made to him in the 14th Amendment by a state of facts which existed relative to the appeal to the Court of Appeals, that the federal questions involved in the appeal to this Court are very substantial.

One of the federal questions definitely involved in the appeal is whether there was violation by a state of facts and circumstances relative to the appeal of appellant's rights and privileges and the"due process of law" guaranteed to him in the 14th Amendment of the United States Constitution. Appellant adopts as part of this part (e) in support of the preceding sentence what he has stated on pages 2 through 6 hereof, and respectfully requests that reference be made to those pages.

With respect to some of the circumstances and facts relating to the appeal to the Court of Appeals of Georgia and the decision of that Court, it is stated that at the end of the hearing held in the Fulton County Superior Court on October 15, 1970, the Court granted a motion, brought by the defendant under Section 81A-112 (b) (6) of the Georgia Code, to dismiss the petition for failure to state a

claim upon which relief can be granted, which motion having become during the hearing a motion for summary judgment because of the presenting of matters outside the pleadings without them being excluded by the Court; that the evidence adduced in behalf of the plaintiff so admitted, which is in the transcript in the record, showed without doubt that genuine issues as to material facts exsited which required trial by jury, plaintiff having made timely written demand for jury trial; that the plaintiff diligently caused the filing of the record on appeal, including a lengthy transcript of the evidence and proceedings of the October 15 hearing and transcript of the proceedings at the October 9 hearing, and the docketing of the appeal as quickly as possible from said final judgment eight days after the filing of the notice of appeal; that on the date, October 27, 1970, of the docketing of the appeal, which was seven days before the November 3 General Election, he filed motion in the Court of Appeals for the hearing of the appeal to be held before the General Election; that his motion was not granted and the appeal was not heard until November 23, 1970; that in its decision rendered on December 1, 1970, the Court of Appeals held the issues raised by the appeal had become moot because of election of the Republican Thompson to the office, erroneously found "no distinction between the holding in this case and "Lowe v. Lindsey" that had been decided by the Supreme Court of Georgia in February, 1967, and dismissed the appeal; that at the first opportunity he had after becoming aware of the decision, appellant in his motion for rehearing ,

which is in the record, raised the federal question of denial to him under said conditions and state of facts of the guarantee of "due process of law' made to him in the 14th Amendment,and raised the additional federal question of the Section 34-1709 "Appellate review" of the Georgia Election Code, as appplied to his etforts to obtain appellate review before the General Election, being violate of the "due process of law" guarantee in the 14th Amendment.

The opinions and decisions by appellate courts cited in part (b) (iv) of this Jurisdictional Statement, on pages 2 through 8-o hereof amply sustain the jurisdiction of this Court with respect to the two said federal questions raised by appellant at his first opportunity in his motion for rehearing. Among the reasons why those two federal questions and the other federal questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution, are the following decisions:

> A party who plainly asserted a federal right in a state trial court and whose appeal from an adverse judgment dismissed by the higher state tribunal upon the ground that the case, after judgment, had become moot,is entitled to the judgment of this court on whether such dismissal in effect denied,or failed duly to recognize, the right asserted and local rules as to the extent of review will not necessarily determine the decision here.
>
> Love v. Griffith,Tex.1924, 45 S. Ct. 12, 266 U. S.32, 69 L. Ed. 157.

"(6) There is one other question which under the peculiar circumstances of this case naturally presents itself, viz. whether the question involved here has become moot, but this is essentially a public question, one which involves the validity of a statute, and the question whether a constitutional right is being taken away is a question which is quite likely to arise at any primary election.

"Under the principles recognized and adopted by the Supreme Court of the United States such questions do not become moot. (Underscoring added). See Giles v. Harris, 23 S. Ct.641, 189 U. S. 484, 47 L. Ed. 909; also Memphis St.Ry. Co. v. Rapid Transit Co., 179 S. W.635, 133Tenn. 99, L. R. A. 1916B,1143, Ann. Cas. 1917C,1045."

Dove v. Oglesby , 244 P. 797,800.

Whether question of violation of a defendant's constitutional rights was adequately presented and was decided in state court is itself a "federal question", as respects Supreme Court's jurisdiction.

Lovell v. City of Griffin, Ga. 58 S. Ct.666, 303 U. S.444,82 L. Ed. 949.

(f) The appeal is not from a federal court.

(g) The appeal is not from a decree of a district court granting or denying an interlocutory injunction.

(h) There is on page iii of the Appendix hereto a copy of the opinion delivered upon the rendering of the judgment of the Court of Appeals of Georgia sought to be reviewed. There is on pages v and vi of the Appendix hereto a copy of the opinion of the Supreme Court of Georgia in an election contest case Lowe v. Lindsey, a case related to this case, the opinion having been delivered on February 23, 1967.

(i) There is on page iv of the Appendix hereto a copy of a letter of the Clerk of the Court of Appeals of Georgia notifying counsel for the parties of the denial of the motion for rehearing. No copy of any order by that court denying the motion was ever received by appellant, attorney pro se.

(j) There is on page i of the Appendix hereto a copy of the notice of appeal to this Court, showing date it was filed and court where filed.

Respectfully submitted,

WYMAN C. LOWE
Appellant, Attorney pro Se
701 Carnegie Building
Atlanta, Georgia 30303

APPENDIX

EXHIBIT

FILED IN OFFICE - Jan 29 1971
/S/ Morgan Thomas, Clerk
Court of Appeals of Georgia

IN THE COURT OF APPEALS
OF THE STATE OF GEORGIA

WYMAN C. LOWE, Appellant,	:	
vs.	:	CASE NO. 45851
ANDREW YOUNG, Appellee.	:	

NOTICE OF APPEAL

Notice is hereby given of the taking of an appeal by WYMAN C. LOWE to the Supreme Court of the United States from the entire judgment entered on December 1, 1970 in the Court of Appeals of the State of Georgia in the above styled case, No. 45851, and from the denial of his motion for rehearing in that case in said Court, which denial having been entered on December 16, 1970. The appeal is taken under the following Statutes of the United States:

June 25, 1948, ch. 646, 62 Stat. 929;
June 25, 1948, ch. 646, 62 Stat. 961;
May 24, 1949, ch. 139, Section 106, 63 Stat. 104.

/S/ WYMAN C. LOWE
WYMAN C. LOWE
Appellant
Attorney pro Se

Address:
701 Carnegie Building
Atlanta, Georgia 30303

PROOF OF SERVICE

I hereby certify that every party required to be served with the foregoing notice of appeal has been served and that I have on this date, January 20, 1971, in compliance with paragraphs 1, 3 (b), and 4 of Rule 33 of the Supreme Court of the United States, served a copy of the foregoing and above notice of appeal upon the adverse party, Andrew Young, by depositing a copy in a United States Post Office, with first class postage pre-paid, addressed to counsel of record for Andrew Young at their Post Office address, Kilpatrick, Cody, Rogers, McClatchey and Regenstein, Attorneys at Law, 1045 Hurt Building, Atlanta, Georgia 30303. I further certify that I am a Member of the Bar of the Supreme Court of the United States.

/S/ Wyman C. Lowe

WYMAN C. LOWE
Attorney

EXHIBIT

123 Ga. App.. 121-2

45851. LOWE v. YOUNG.

JORDAN, Presiding Judge. Wyman C. Lowe filed his petition against Andrew Young to contest the result of the Democratic Primary Election run-off for United States Congressman for the Fifth Congressional District of Georgia held on September 23, 1970, alleging that there were sufficient illegal votes cast in the polling places of 38 precincts sufficient to change or cast doubt on the result of the election. The petition further showed that appellant Wyman C. Lowe received 36,194 votes and that appellee Andrew Young received 53,709 votes in said run-off election. On October 15, 1970, the trial court sustained the defendant Young's motion to dismiss the petition for failure to state a claim upon which relief could be granted, from which ruling plaintiff Lowe appeals. Pursuant to appellant's motion for an early hearing, the appeal was set down for argument on November 23, 1970. *Held:*

The issues raised by this appeal are moot. The court will take judicial notice of the fact that in the general election held on November 9, 1970, the Republican candidate Fletcher Thompson won over the Democratic candidate Andrew Young (the appellee here) and that the results of said election have been certified by the officials responsible for conducting the election. Under these circumstances, this court finds no distinction between this case and the holding in *Lowe v. Lindsey*, 223 Ga. 173 (154 SE2d 11). Accordingly, the appeal must be and is

Dismissed. Deen and Quillian, JJ., concur.

ARGUED NOVEMBER 23, 1970—DECIDED DECEMBER 1, 1970—REHEARING DENIED DECEMBER 16, 1970.

Election contest. Fulton Superior Court. Before Judge Hubert from Stone Mountain Circuit.

Wyman C. Lowe, for appellant.

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, R. Lawrence Ashe, Jr., A. Stephens Clay, Robert W. Coleman, for appellee.

EXHIBIT

45851

Morgan Thomas
Clerk
Edna B. Webb
Deputy Clerk

COURT OF APPEALS OF GEORGIA
CLERK'S OFFICE
435 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334

December 16, 1970

Mr. R. Lawrence Ashe, Jr.
Mr. Wyman C. Lowe
Attorneys at Law
Atlanta, Georgia 30303

The Motion for Rehearing in Case
No. 45851. W. C. Lowe
vs. Andrew Young
was denied today.

Morgan Thomas, Clerk
Court of Appeals of Georgia.

V

EXHIBIT

223 Ga.

174

23953. LOWE v. LINDSEY et al.

Nichols, Justice. Wyman C. Lowe, as the runner-up in the Democratic primary for the office of U. S. Congressman for the Fifth District of Georgia, held on September 14, 1966, filed the present action after the party nominee withdrew from the race and the Fulton County Democratic Executive Committee named Archie Lindsey, who had not been a candidate for such nomination in the primary, as the official nominee of the party to run in the general election in November, 1966. The petition as originally filed sought to have the plaintiff declared the party nominee, and a substitute petition filed as an amendment to the original petition, sought a special primary to name the Democratic nominee for such office. The petition as finally amended named only the substitute nominee and the State Democratic Executive Committee including its primary subcommittee as defendants. No county or State officials were named as defendants in the plaintiff's petition as finally amended. On November 1, 1966, the defendant's general demurrers to the plaintiff's petition were sustained and on November 7, 1966, the plaintiff filed a notice of appeal to the judgment sustaining such demurrers and dismissing his petition. *Held:*

1. The petition as finally amended sought relief against party officials of the Democratic Party only. No relief was sought against any county or State official who was required to hold the general election, certify the results or issue a commission

(Continued, next page)

as a result thereof. The election was held on November 8, 1966, and the nominee of the Democratic Party named in the plaintiff's petition was not elected, a commission having been issued by the Governor to Fletcher Thompson on December 12, 1966, as the elected U. S. Congressman from the Fifth Congressional District of Georgia.

2. The courts of this State are bound to take judicial notice of the public officers who hold under commissions issued by the Governor. *Hartford Accident &c. Co. v. Mapp*, 96 Ga. App. 517 (100 SE2d 742), and citations.
3. The Governor is required by law to issue commissions to Representatives in Congress. *Code* § 40-203.
4. There being no relief sought against the person elected to Congress in the general election, or against the election officials required to hold and certify such election results, the questions presented by the plaintiff's petition as finally amended are moot. Accordingly, the appeal must be dismissed.

Appeal dismissed. All the Justices concur.

SUBMITTED FEBRUARY 15, 1967—DECIDED FEBRUARY 23, 1967—REHEARING DENIED MARCH 9, 1967.

Equitable petition. Fulton Superior Court. Before Judge Barrow from Western Circuit.

Wyman C. Lowe, for appellant.

Edenfield, Heyman & Sizemore, Newell Edenfield, Paul L. Hanes, Robert G. Young, for appellees.

EXHIBIT

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

WYMAN C. LOWE
Plaintiff-Contestant

vs.

ANDREW YOUNG
Defendant-Contestee

FILED IN OFFICE
OCT 15 1970

/S/ Clarence A. Lanford
DEPUTY CLERK SUPERIOR COURT
FULTON COUNTY GEORGIA

Civil Action
No. B-59025

ORDER

The above captioned action, having been specially set before this Court, and this Court, having reviewed the allegations of Plaintiff's complaint, as amended, and having considered the evidence presented in this contested election, and after hearing and considering argument of counsel for the parties, finds as a matter of law that there are not issues of fact which require determination by a jury and further finds that the evidence is not sufficient to justify a decision that there have been sufficient errors or irregularities in the election at issue either to change the result thereof or to place the result in doubt, but rather that, giving Plaintiff-Contestant credit for all of the irregularities which may be said to have been shown by him and further viewing all of his evidence in its most favorable light to him, the aforesaid Plaintiff-Contestant would still not have sufficient votes to change the result of the contested election or to place the same in doubt,

AND IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED THAT the motion of the Defendant-Contestee be and the same is hereby granted, and the Court declares that Andrew Young is the nominee of the Democratic party in the runoff primary election held on September 23, 1970, for the Fifth United States Congressional District for the State of Georgia, and costs are assessed against plaintiff-contestant.

This 15th day of October, 1970.

/S/ H. O. Hubert, Jr.

Hon. H. O. Hubert, Jr.
Judge, Election Contest

EXHIBIT

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WYMAN C. LOWE,
Plaintiff-Contestant

vs.

ANDREW YOUNG,
Defendant-Contestee

Congressional Primary
Election Run-off
Contest,

Civil Action
No. B-59025

ORDER

IT IS HEREBY ORDERED that all reference in plaintiff-contestant's petition in the above-captioned complaint to alleged "subversive" activities by the defendant-contestee be stricken from said petition pursuant to section 12(f) of the Georgia Civil Practice Act as immaterial, impertinent, scandalous and insufficient as a matter of law, and defendant-contestee's motions presented in the Seventh, Eighth, and Ninth Defenses of defendant-contestee's Answer and Defenses are hereby granted and sustained.

This 9th day of October, 1970.

/S/ H. O. Hubert, Jr.

JUDGE H. O. HUBERT

EXHIBIT

STATE OF GEORGIA
SUPREME COURT
ATLANTA

January 19, 1971

Mr. Wyman C. Lowe
Attorney at Law
701 Carnegie Building
Atlanta, Georgia

Re: Lowe v. Young

Dear Mr. Lowe:

Enclosed are your application for certiorari and copies, check for certiorari costs, and Rule 53 certificate, all of which the court has directed be returned to you since your application could not be filed without the Rule 53 certificate and such certificate was not received until after the time for application had expired.

Yours very truly,

/S/ Joline B. Williams

Mrs. Joline B. Williams,
Clerk

JBW:hh

Enclosures

x

EXHIBIT

Bond Almand, Chief Justice
Carlton Mobley, Presiding Justice
Benning M. Grice
H. E. Nichols
Hiram K. Undercofler
Jule W. Felton
Peyton S. Hawes
Associate Justices

Henry H. Cobb, Clerk
Eva F. Townsend, Deputy Clerk
Carrie L. Bell, Deputy Clerk
Geo. H. Richter, Jr., Reporter
Guy M. Massey, Asst. Reporter
A. Broaddus Estes, Sheriff

STATE OF GEORGIA
SUPREME COURT
ATLANTA

March 10, 1971

Honorable E. Robert Seaver, Clerk
Supreme Court of The United States
Washington, D. C.

Dear Mr. Seaver:

Mr. Wyman C. Lowe has requested that I write you as to the events which preceded the attached letter (copy) from this office to Mr. Lowe.

Sometime around the middle of January, Mr. Lowe telephoned this office with questions regarding filing an application for certiorari to The Court of Appeals and he stated that it was his "last day." He spoke of mailing the application in time to have it postmarked that day, and I told him he could do that or he could come to our building before midnight and have one of the building security guards place the application, with the guard's notation as to the time, in the clerk's office - and

in either case it could be docketed as of that day. Mr. Lowe says the foregoing occurred on Friday, January 15. I do not remember the date.

At any rate, when we opened the office on the next business day (we do not open on Saturday), Mr. Lowe's application was in the office, and it bore a notation by a security guard which showed that it was placed in the office before midnight of the day of the conversation detailed above. However, when we checked to ascertain if the application was in order, preparatory to docketing it, we found that there was no certificate as required by Rule 53 of this court, and therefore we could not docket the application.

Rule 53 provides that:

> "No application for certiorari will be filed by the clerk or considered by the court unless accompanied by a certificate of counsel that he verily believes that the case is one which is contemplated by the rules of this court pertaining to certiorari, and that it does not fall within the class of those prohibited by the rules of this court."

Upon ascertaining that we could not docket the application because of the absence of The Rule 53 certificate, this office called Mr. Lowe, so informed him and inquired whether he wished to have the application, his check for costs, etc., mailed back to him or whether he preferred our holding them for him to come get them. He instructed us not to mail them at that time.

Later, (Mr. Lowe says he had a security guard leave it in this office after we were

closed - I do not remember now exactly how or when it reached us and have no record of the times or dates since the application was not docketed and the papers were returned), Mr. Lowe furnished this office with a Rule 53 certificate and insisted that the application be docketed.

Since his time for filing application for certiorari was past, I took the matter to the court and received the instructions stated in the attached letter.

Yours very truly,

/S/ Joline B. Williams

Mrs. Joline B. Williams,
Clerk

JBW:hh

Enclosure

I hereby certify that I am qualified to vote at the
☐ Democratic
☐ Republican (Choose one) RUN-OFF GENERAL PRIMARY held on _____ (Month) _____ (Day), 19__, and that I have not and will not vote elsewhere in this RUN-OFF GENERAL PRIMARY.

Signature _____ Address _____
R.F.D., Street, Road and City

Ballot No. _____ Name or initials of Poll Officer receiving voter's certificate: _____
(or number of admission to voting machine)

In case of physical disability, or illiteracy, fill out the following:
I hereby certify that the voter is unable to sign his or her name by reason of the following: _____

_____
Signature of Poll Officer

Form No. 7—D—70

EXHIBIT

VOTER'S CERTIFICATE — RUN-OFF GENERAL PRIMARY

_____ COUNTY, STATE OF GEORGIA

I hereby certify that I am qualified to vote at the
☐ Democratic
☐ Republican (Choose one) RUN-OFF GENERAL PRIMARY held on Sept 23 (Month) (Day), 19 70, and that I have not and will not vote elsewhere in this RUN-OFF GENERAL PRIMARY.

Signature Bessie B. Burston Address 5 Evelyn Tifton
R.F.D., Street, Road and City

Ballot No. 1424 Name or initials of Poll Officer receiving voter's certificate: _____
(or number of admission to voting machine)

In case of physical disability, or illiteracy, fill out the following:
I hereby certify that the voter is unable to sign his or her name by reason of the following: _____

_____
Signature of Poll Officer

Form No. 7—D—70

P-29
10/5/70
DW

VOTER'S CERTIFICATE — RUN-OFF GENERAL PRIMARY

_____ COUNTY, STATE OF GEORGIA

I hereby certify that I am qualified to vote at the
☐ Democratic
☐ Republican (Choose one) RUN-OFF GENERAL PRIMARY held on Sept 23 (Month) (Day), 19 70, and that I have not and will not vote elsewhere in this RUN-OFF GENERAL PRIMARY.

Signature Katherine L Mitchell Address 5 Evelyn Tifton
R.F.D., Street, Road and City

Ballot No. 1425 Name or initials of Poll Officer receiving voter's certificate: _____
(or number of admission to voting machine)

In case of physical disability, or illiteracy, fill out the following:
I hereby certify that the voter is unable to sign his or her name by reason of the following: _____

_____
Signature of Poll Officer

P-29
10/5/70

[illegible] MARIELLE B. [illegible] (MRS.) DAVIS
LAST NAME FIRST NAME MIDDLE INITIAL MAIDEN NAME

[illegible] ATLANTA, GA. 30314 3 4B
STREET NAME CITY ZIP CODE WARD PRECINCT C.D. OF

3-6-28 F [illegible] PROVO GA. BRN BLK 147
DATE OF BIRTH SEX CITY PLACE OF BIRTH COUNTY STATE COLOR EYES COLOR HAIR WEIGHT

VOTER TRANSFERRING TO FULTON COUNTY

(COUNTY FROM WHICH TRANSFERRED)

EXHIBIT

MY MOTHER'S MAIDEN NAME: MITTIE BELL DAVIS — FATHER'S NAME: WILLIE J. DAVIS — YOUR OCCUPATION: HOME MAKER

17-68 LESS 6 YRS. NO
DATE OF BIRTH DATE WILL HAVE RESIDED 1 YR. IN STATE — 6 MOS. IN COUNTY ASSISTANCE RECEIVED AS SET OUT IN SEC. 34-1906

THIS ____ DAY OF ____ 19__

OATH OF VOTER – GEORGIA, FULTON COUNTY

I do swear or affirm, that I am a citizen of the United States and of this State, that I am 18 years of age, or will be on the (date shown elsewhere on this card), that I have resided in this State for one year, and in this county, for six months, immediately preceding the date of this oath, or will have by reason of the date shown elsewhere on this card; that I believe I have the qualifications of an elector required by the Constitution of this State; that I am not registered in any other county; that I am not registered under any other name; that I have correctly answered the questions appearing elsewhere on this card.

Mitchell Katherine
REGISTRANT'S SIGNATURE

SWORN TO AND SUBSCRIBED BEFORE ME

DEPUTY REGISTRAR

Any applicant who shall be convicted in any court of competent jurisdiction of treason, embezzlement of public funds, malfeasance in office, bribery, or larceny, or any crime involving moral turpitude, punishable by the laws of this state with imprisonment in the penitentiary.

This application is APPROVED this 20 day of MAY 1969

FULTON COUNTY BOARD OF REGISTRARS

P-26

MITCHELL KATHERINE D. (MRS. CLARENCE D., JR.) DOOLEY
LAST NAME FIRST NAME MIDDLE INITIAL MAIDEN NAME

HUDSON STREET, NE ATLANTA
STREET NAME CITY ZONE WARD PRECINCT C.D. OF DATE

9/26/20 F HARDWELL HART GA. BRN BRN 260
DATE OF BIRTH SEX CITY PLACE OF BIRTH COUNTY STATE COLOR EYES COLOR HAIR WEIGHT

VOTING RECORD

DATE	INITIALS	INITIALS	INITIALS	INITIALS
1959				
1960				
1961	SEPT. 13	SEP...		
1962	CC	...	...	...
1963				
1964	CR	...		
1965				
1966				
1967				
1968				
1969				
1970				
1971				
1972				
1973				
1974				
1975				

MAIDEN NAME: MARIELLE BAYNS — FATHER'S NAME: JOHNNIE B. DOOLEY — OCCUPATION: HOUSEWIFE & SEAMSTRESS

[illegible] TEXAS NO YEARS MO
DATE OF BIRTH DATE WILL HAVE RESIDED 1 YR. IN STATE — 6 MOS. IN COUNTY ASSISTANCE RECEIVED AS SET OUT IN SEC. 34-1906

I SWEAR (AFFIRM) THAT THE INFORMATION APPEARING UNDER "OATH OF VOTER, GEORGIA-FULTON COUNTY" IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF, SO HELP ME.

[illegible] Mitchell K. Mitchell
SIGNATURE OF APPLICANT REGISTRANT'S SIGNATURE

CHANGE OF ADDRESS WARD OR DISTRICT CLERK

[illegible] SD 27 – 634 FH

P-27

EXHIBIT

C-547

WILLIAM B. TILLISON

1084 TILDEN ST. N. W.

ATLANTA, GA. 30318

Official Absentee Ballot

Primary Election

September 23, 1970

CANDIDATES

FOR GOVERNOR (Vote for One)

JIMMY CARTER

CARL E. SANDERS

FOR CONTROLLER GENERAL (Vote for One)

MAC BARBER

JOHNNIE L. CALDWELL

FOR PUBLIC SERVICE COMMISSIONER, POST 1 (Vote for One)

MILTON FARRIS

CECIL TURNER

05

BOARD OF REGISTRARS

FULTON COUNTY

ATLANTA GEORGIA

30303

SEP 1970

PROOF OF SERVICE

I hereby certiry that I have on this date, April 12, 1971, before the filing of the copy hereof having manuscript signature of the undersigned thereon, served a copy of the foregoing Jurisdictional Statement upon counsel of record in the state courts in this case for Andrew Young, by mailing in the U. S. Mails, with sufficient postage to insure delivery, a copy addressed to Kilpatrick, Cody, Rogers, McClatchey and Regenstein, Attorneys at Law, 1045 Hurt Building, Atlanta, Ga. 30303.

WYMAN C. LOWE
Attorney